INDIRECT ENCROACHMENT ON FEDERAL AUTHORITY BY THE TAXING POWERS OF THE STATES.[1] VI

II. REGULATIONS OF INTERSTATE COMMERCE (*continued*)

2. *Taxes not Discriminating Against Interstate Commerce* (continued)

C. TAXES ON ACTS, OCCUPATIONS, OR INCOME.

THIS study has now reached a point where the remaining cases can most profitably be considered under the somewhat omnibus rubric chosen for this section. We have seen that the Supreme Court has not been meticulous in inquiring whether the statute under which a tax is imposed calls it a tax on property or on a franchise or on capital stock or "on the corporation itself." If a rose by another name would smell sweeter, it has sometimes been rechristened and found sweet enough to accept. "Literal adherence to particular nomenclature should not be allowed to control construction in arriving at the true intention and effect of state legislation,"[2] observed Chief Justice Fuller in a passage already quoted.[3] In spite of the rule that earnings from interstate commerce may not be taxed directly, such earnings have been accorded recognition in assessing the amount of taxes on privileges or property. Most of the cases have dealt with valuations that regarded a capitalization of net earnings.[4] But *Maine* v. *Grand Trunk Railway*

[1] For preceding instalments of this discussion see 31 HARV. L. REV. 321–72 (January, 1918); *Ibid.*, 572–618 (February, 1918); *Ibid.*, 721–78 (March, 1918); *Ibid.*, 932–53 (May, 1918); and 32 HARV. L. REV. 234–65 (January, 1919).

[2] Postal Telegraph Cable Co. *v.* Adams, 155 U. S. 688, 700, 15 Sup. Ct. Rep. 268 (1895).

[3] 32 HARV. L. REV. 249.

[4] The Delaware Railroad Tax, 18 Wall. (U. S.) 206 (1873), 32 HARV. L. REV. 236; Western Union Telegraph Co. *v.* Massachusetts, 125 U. S. 530, 8 Sup. Ct. Rep. 961 (1888), 32 HARV. L. REV. 239; Massachusetts *v.* Western Union Telegraph Co., 141 U. S. 40, 11 Sup. Ct. Rep. 889 (1891), 32 HARV. L. REV. 239; Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18, 11 Sup. Ct. Rep. 876 (1891), 32 HARV. L. REV. 240; Cleveland, C., C. & St. L. Ry. Co. *v.* Backus, 154 U. S. 439, 14 Sup. Ct. Rep. 1122 (1894), 32 HARV. L. REV. 244; Pittsburgh, C. C. & St. L. Ry. Co. *v.* Backus, 154 U. S. 421, 14 Sup. Ct. Rep. 1114 (1894), 32 HARV. L. REV. 248; Western Union Telegraph

Co.,[5] *Erie Railroad* v. *Pennsylvania*[6] and *Henderson Bridge Co.* v. *Kentucky*[7] accepted the measure of gross earnings, some or all of which were from interstate commerce.

To an untutored mind, taxes measured by gross earnings are a form of income taxes; and from now on it will be convenient to treat them as such, no matter by what name courts or legislatures may choose to call them. It will help towards seeing things as they are, if we emulate the attitude of Mr. Justice Holmes in his illuminating essay on "The Path of the Law,"[8] in which, in order to point to the distinction between law and morals, he looks to the mental and emotional processes of the "bad man." For our purposes we may invoke that more estimable person whom we know as the "business man." This pecuniary creature will think that he is taxed on his income when his tax varies directly with the ups and downs of his income, even though judges and scholars may assure him that he is taxed on something entirely different. He will be primarily interested in knowing when and why such a tax must be paid and when and why it can be escaped. He will care less what such a tax is called by those versed in legal niceties than what its effect will be on his balance sheet. To him, at least, we may look for forgiveness for such imperfect coördination as may be indulged in by treating together all taxes measured by income, whether they are formally taxes on income or taxes on occupations, franchises or property.

For a decade after the Ohio Express cases,[9] there was comparative quiet among those subjected to taxes that took account of earnings from interstate commerce. *Parke, Davis & Co.* v. *Roberts*[10] sustained a tax on that part of the capital stock of a foreign corporation which was regarded as employed within the state, although

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Co. *v.* Taggart, 163 U. S. 1, 16 Sup. Ct. Rep. 1054 (1896), 32 HARV. L. REV. 248; Adams Express Co. *v.* Ohio State Auditor, 165 U. S. 194, 17 Sup. Ct. Rep. 305 (1897), 166 U. S. 185, 17 Sup. Ct. Rep. 604 (1897), 32 HARV. L. REV. 251; Adams Express Co. *v.* Kentucky, 166 U. S. 171, 17 Sup. Ct. Rep. 527 (1897), 32 HARV. L. REV. 258, note 104.

5 142 U. S. 217, 12 Sup. Ct. Rep. 121 (1891), 31 HARV. L. REV. 579–80, 32 HARV. L. REV. 242.

6 158 U. S. 431, 15 Sup. Ct. Rep. 896 (1895), 32 HARV. L. REV. 249.

7 166 U. S. 150, 17 Sup. Ct. Rep. 532 (1897), *Ibid.*, 258, note 104.

8 10 HARV. L. REV. 457–78.

9 Adams Express Co. *v.* Ohio State Auditor, note 4, *supra*.

10 171 U. S. 658, 19 Sup. Ct. Rep. 58 (1898).

the corporation was engaged partly in interstate commerce and the tax was graduated according to the annual dividends. Mr. Justice White did not sit, and Justices Harlan and Brown dissented; but their objections were confined to what they regarded as a discrimination against interstate commerce because the tax was imposed only on corporations not "wholly engaged" in business within the state.[11]

In 1900 the court unanimously sustained a tax on the total capital stock of a domestic corporation owning an interstate bridge, which was in addition to a tax on its tangible property.[12] Three years later *Western Union Telegraph Co.* v. *Missouri* [13] sanctioned Missouri's application of the unit rule to the property of the Western Union within the state. Mr. Justice Brewer concurred only in the result, and Justices White and Peckham dissented; but whether on the main point of the case or on the subordinate one that a complaint against discriminatory overvaluation cannot be raised in an action at law, does not appear, as there is no dissenting opinion.

Meanwhile other cases had sanctioned assessments of property employed in interstate commerce, which did not take account of

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[11] The majority recognized that "if the object of the law in question was to impose a tax upon products of other States while exempting similar domestic goods from taxation, there might be room to contend that such a distinction was constitutionally objectionable as tending to affect or regulate commerce between the States" (171 U. S. 658, 662, 19 Sup. Ct. Rep. 58). But the tax was said not to be directly on the articles brought into the state or on their sale, nor on property in other states. It was conceded that the tendency of the law might be "to encourage manufacturing corporations which seek to do business in that State to bring their plants into New York" (*Ibid.*, 665); but the absence of any distinction between domestic and foreign corporations was thought to cure any evil lurking in this design.

The majority cannot be said to have dealt satisfactorily with the contentions of the minority. Mr. Justice Shiras refers to the Ohio Express cases and others to show "the distinction between corporations organized to carry on interstate commerce, and having a quasi-public character, and corporations organized to conduct strictly private business" (*Ibid.*). The drug concern before the court was said to come within the doctrine of Paul *v.* Virginia, 8 Wall. (U. S.) 168 (1869), and Horn Silver Mining Co. *v.* New York, 143 U. S. 305, 12 Sup. Ct. Rep. 403 (1892), and therefore to be subject to the arbitrary power of the state with respect to any exaction on its local business. This ground of the decision is now completely undermined by Looney *v.* Crane Co., 245 U. S. 178, 38 Sup. Ct. Rep. 85 (1917), 31 HARV. L. REV. 601–18.

[12] Keokuk & Hamilton Bridge Co. *v.* Illinois, 175 U. S. 626, 20 Sup. Ct. Rep. 205 (1900).

[13] 190 U. S. 412, 23 Sup. Ct. Rep. 730 (1903).

earnings. Two of these were Colorado [14] and Utah [15] assessments of refrigerator cars, which determined by count the average number of cars within the state and fixed a valuation of $250 per car. Two were *ad valorem* assessments of interstate bridges.[16] *Western Union Telegraph Co.* v. *New Hope* [17] and *Atlantic & Pacific Telegraph Co.* v. *Philadelphia* [18] sanctioned license fees on telegraph companies based on the number of poles and of miles of wire, in spite of the fact that it was conceded that the exactions might yield some surplus over the cost of supervision on which the license was professedly based. The state and municipal requirements sustained in these cases make it clear that it is not necessary to measure property taxes by a capitalization of earnings. Since it is feasible to assess cars and bridges and telegraph lines in ways that do not make the tax vary with the income from their use, it is difficult to contest the position that taxes based on a valuation of capital stock or on dividends or gross receipts are in substance a species of income taxes. The sublimation by which earnings are transmuted into a valuation of capital stock need not deceive us.

I. *Taxes Measured by Gross Receipts.*

There is no dispute that gross receipts from interstate commerce are not taxable directly as such.[19] The Supreme Court will not swallow a gross-receipts pill unless it is fiction-coated. Our task is to discover what coating is necessary to make it palatable. In the section on taxes on privileges we have already dealt with *Maine* v. *Grand Trunk Railway Co.*,[20] which sustained a gross-receipts

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[14] American Refrigerator Transit Co. *v.* Hall, 174 U. S. 70, 19 Sup. Ct. Rep. 599 (1899).

[15] Union Refrigerator Transit Co. *v.* Lynch, 177 U. S. 149, 20 Sup. Ct. Rep. 631 (1900).

[16] Pittsburgh, C. C. & St. L. Ry. Co. *v.* Board of Public works, 172 U. S. 32, 19 Sup. Ct. Rep. 90 (1898); Henderson Bridge Co. *v.* Henderson City, 173 U. S. 592, 19 Sup. Ct. Rep. 553 (1899).

[17] 187 U. S. 419, 23 Sup. Rep. 204 (1903).

[18] 190 U. S. 160, 23 Sup. Ct. Rep. 817 (1903).

[19] Fargo *v.* Michigan, 121 U. S. 230, 7 Sup. Ct. Rep. 857 (1887); Philadelphia & Southern Mail S. S. Co. *v.* Pennsylvania, 122 U. S. 326, 7 Sup. Ct. Rep. 1118 (1887); Western Union Telegraph Co. *v.* Alabama Board of Assessment, 132 U. S. 472, 10 Sup. Ct. Rep. 161 (1889); Western Union Telegraph Co. *v.* Texas, 105 U. S. 460 (1881).

[20] 142 U. S. 217, 12 Sup. Ct. Rep. 121 (1891), 31 HARV. L. REV. 579–80, 32 HARV. L. REV. 241.

tax nominally on the privilege of exercising corporate franchises within the state. The theory of the majority was that the measure of the tax did not matter, as the state had absolute and arbitrary power over such privileges as it might in its discretion grant or withhold. In 1910 this theory was abandoned,[21] so that the Maine case must now find some other leg to stand on or must fall. We shall see that the necessary prop was supplied [22] two years before the original foundation was destroyed.

At the same term in which the Maine case was decided, *Ficklen* v. *Shelby County Taxing District* [23] sustained a gross-receipts tax without the justification of arbitrary power over corporate privileges. The tax was not in terms on the gross receipts and thus was distinguished by the majority from taxes levied on receipts from interstate commerce "as such." Mr. Justice Harlan was the only one to dissent. He insisted that receipts from interstate commerce cannot be included in the measure of any tax on an occupation. He professed to believe that his eight colleagues would have agreed with him, had the Taxing District expressly required that a license to do a general commission business should be withheld until the applicant had paid a percentage of his gross commissions from interstate sales during the preceding year. The different method which had been adopted was characterized as "a very clever device to enable the Taxing District of Shelby County to sustain its government by taxation upon interstate commerce."[24]

This so-called "device" took the form of a requirement that all who desired to do business as general brokers, etc., should take out a license, pay a fee of $50, and in addition pay ten cents for every $100 of capital invested in the business, or, in the absence of such invested capital, give a bond conditioned on the payment of two and one half per cent on the gross commissions during the year for which the license was desired. Complainants had no capital. They had given the required bond. It chanced that the business of Ficklen during the year 1887 had consisted entirely of negotiating interstate sales, and that nine-tenths of the sales and commissions

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[21] Western Union Telegraph Co. *v.* Kansas, 216 U. S. 1, 30 Sup. Ct. Rep. 190 (1910); Pullman's Palace Car Co. *v.* Kansas, 216 U. S. 56, 30 Sup. Ct. Rep. 232 (1910).

[22] In Galveston, H. & S. A. Ry. Co. *v.* Texas, 210 U. S. 217, 28 Sup. Ct. Rep. 638 (1908), considered *infra*, 385, et seq.

[23] 145 U. S. 1, 12 Sup. Ct. Rep. 810 (1892).

[24] *Ibid.*, 28.

of the other complainant had been interstate. Both sought a license for the ensuing year without fulfilling the obligation assumed in the bond given the preceding year. The court found that the subject taxed was the privilege of doing a general brokerage business, including intra-state as well as interstate, and that it was therefore taxable. It recognized that a different question would have arisen if the complainants "had not undertaken to do a general commission business, and had taken out no licenses therefore, but had simply transacted business for non-resident principals."[25]

Here obviously is the simple case of a tax on local business, measured by gross receipts from all business, with the only additional element that this measure of receipts was to be used only in case the business was done without capital. Had the complainants seen fit to employ $100 of capital, they would have paid ten cents each instead of a percentage of their receipts. This element in the case was accorded weight, for Chief Justice Fuller remarked:

"We presume it would not be doubted that, if the complainants had been taxed on capital invested in the business, such taxation would not have been obnoxious to constitutional objection; but because they had no capital invested, the tax was ascertained by reference to the amount of their commissions, which when received were no less their property than their capital would have been."[26]

It is to be noted, however, that this observation appears in the final paragraph of the opinion, and that the preceding discussion conveys no hint that the tax on the gross receipts would not have been quite as proper if it had not been the alternative of a tax on capital. After quoting from Mr. Justice Bradley's opinion in *Philadelphia & Southern M. S. S. Co.* v. *Pennsylvania*[27] that "the corporate franchises, the property, the business, the income of corporations created by a State may undoubtedly be taxed by the State,"[28] Chief Justice Fuller adds that "this of course is equally true of the property, the business, and the income of individual citizens of a State."[29] And later, after discussing *Maine* v. *Grand Trunk Railway Co.*,[30] he declares:

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[25] 145 U. S. 24, 12 Sup. Ct. Rep. 810 (1892).

[26] *Ibid.*, 24.

[27] Note 19, *supra*.

[28] 122 U. S. 326, 345, 7 Sup. Ct. Rep. 1118 (1887), quoted in 145 U. S. 1, 22, 12 Sup. Ct. Rep. 810 (1892).

[29] *Ibid.*

[30] Note 20, *supra*.

"Since a railroad company engaged in interstate commerce is liable to pay an excise tax according to the value of the business done in the State, ascertained as above stated, it is difficult to see why a citizen doing a general business at the place of his domicil should escape payment of his share of the burdens of municipal government because the amount of his tax is arrived at by reference to his profits."[31]

The Chief Justice insists that "this tax is not on the goods or on the proceeds of the goods, nor is it a tax on nonresident merchants,"[32] and then invokes the familiar and convenient slogan that "if it can be said to affect interstate commerce in any way it is incidentally, and so remotely as not to amount to a regulation of such commerce."[33]

By this decision Shelby County appears to have achieved indirectly what it would be forbidden to attain directly. It used receipts on which it could not impose a tax as the measure of a tax on something else. It was on the nature of that something else that the court fixed its attention. Had the county declared that no business at all might be done without a license, a broker would then come within the fangs of the law by doing interstate commerce alone, and the tax would have been held to be one on a subject that is interstate commerce itself.[34] But here it was the broker, and not county, that wrapped interstate and local commerce in the same package. The Chief Justice admonishes Mr. Ficklen that he has only himself to blame for his predicament, since he asked for a license to do a "general" business, and did not restrict his professions to interstate business.

"The tax was not laid on the occupation or business of carrying on interstate commerce, or exacted as a condition of doing any particular commission business; and complainants voluntarily subjected themselves thereto in order to do a general business."[35]

[31] 145 U. S. 1, 24, 12 Sup. Ct. Rep. 810 (1892).

[32] *Ibid.*, 24.

[33] *Ibid.*, 24.

[34] Robbins *v.* Shelby County Taxing District, 120 U. S. 489, 7 Sup. Ct. Rep. 592 (1887); Leloup *v.* Port of Mobile, 127 U. S. 640, 8 Sup. Ct. Rep. 1380 (1888); Crutcher *v.* Kentucky, 141 U. S. 47, 11 Sup. Ct. Rep. 851 (1891); Williams *v.* Talladega, 226 U. S. 404, 33 Sup. Ct. Rep. 116 (1912); Barrett *v.* New York, 232 U. S. 14, 34 Sup. Ct. Rep. 203 (1914). In all but the first of these the complainant was engaged in local as well as interstate commerce, and was therefore taxable under a statute or ordinance properly drawn.

[35] 145 U. S. 1, 22, 12 Sup. Ct. Rep. 810 (1892).

Thus the court preserved the fiction that interstate commerce cannot be taxed, and contented itself with finding that the "subject" on which the burden was imposed was not interstate commerce and in holding that therefore a tax on that subject is not a tax on interstate commerce.

The next gross-receipts taxes to come before the court were ones imposed by North Dakota on the Northern Pacific Railroad. A statute of 1883 provided that "all railroad companies, except railroads operated by horse power, owned and operated within the territory, should pay two per centum on the gross earnings of their railroads for a period of five years, and thereafter three per centum on the gross earnings, in lieu of all other taxes upon said railroads and the capital stock thereof." [36] The law was changed in 1889 so as to give the road the option of paying the gross-earnings tax or of having its property subjected to *ad valorem* assessments like those on other property in the state. The Northern Pacific accepted the Act of 1889, but did not pay in full the gross-earnings tax due in that year. Some of its lands were assessed for local taxation, and the company brought a bill to enjoin their sale for nonpayment of the tax. Relief was denied in *Northern Pacific R. R. Co.* v. *Clark* [37] on the ground that the company had no standing in equity until it had paid what was due under one or the other of the two modes of assessment. The road had contended that it was liable under neither. It argued that by accepting the Act of 1889 it gained exemption from ordinary taxation on its lands, and that it was excused from paying the gross-receipts tax by reason of the subsequent repeal of the statute under which it was imposed. The court held, however, that the Act of 1889 contemplated no exemption of any property, but merely offered two optional modes of assessment of that property. Though the case passed on no constitutional question, it figures in the family tree of the distinction subsequently drawn between taxes on gross receipts in addition to other demands and the same taxes as a substitute for other impositions.

Other lands of the railroad had been sold for nonpayment of local taxes assessed prior to 1889. These were lands not adjacent

[36] Stated by Mr. Justice Jackson in Northern Pacific R. R. Co. *v.* Clark, 153 U. S. 252, 264, 14 Sup. Ct. Rep. 809 (1894).

[37] 153 U. S. 252, 14 Sup. Ct. Rep. 809 (1894).

to the right of way, which had been taxed locally on the assumption that the compulsory gross-earnings tax imposed by the law of 1883 was in lieu only of taxation on lands which actually contributed to the earnings through their use in the business. In *McHenry* v. *Alford*[38] the receivers of the road brought a bill to have the tax deeds declared invalid, since the gross-receipts tax had been fully paid. The purchasers defended on the grounds that the gross-receipts tax had no bearing on the local taxation of lands not adjacent to the right of way and, further, that it was not a valid tax and so could not operate to exempt the lands from other demands. Neither position was accepted by the court, although only the first was formally passed upon. As to this it was declared that, since the lands not adjacent to the right of way had been pledged for the payment of bonds issued to build and equip the road, and thus helped to make the earnings possible, their relation to the road and its operation was such that it was a proper classification to include them in all the property of the company which was relieved from local assessments and subjected to the gross-earnings tax, and that this was what the statute intended.[39]

The court was relieved from the necessity of passing explicitly on the question whether the gross-earnings tax was unconstitutional as a regulation of interstate commerce, because it found that the Act of 1889 was in the nature of a compromise which, when accepted by the company and complied with to the extent of paying all arrearages due under the Act of 1883, operated as an implied release from any other taxes assessed for any period which the gross-earnings tax covered. Nevertheless Mr. Justice Peckham

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[38] 168 U. S. 651, 18 Sup. Ct. Rep. 242 (1898).

[39] Mr. Justice Peckham said that the language of the Act of 1883 "gives great reason to doubt the correctness of the construction which would levy the tax upon the earnings derived from interstate commerce" (168 U. S. 651, 670). The doubt did not have to be resolved, since the company had paid all that had been assessed against it, and could not be in a worse position in recovering its lands because of the chance that it might have paid more than the legislature had intended to exact. The construction of Mr. Justice Peckham is strained and is inconsistent with the declaration in the Act of 1889 which reads: "Any company which has not complied with the provisions of chapter 99 of the Session Laws of 1883 by paying all taxes claimed on gross earnings, both territorial and interstate, or by filing an account of gross earnings, both territorial and interstate, shall prepare and file such account in the manner therein provided . . . and pay one half of the entire amount due. . . ." 168 U. S. 651, 656, 18 Sup. Ct. Rep. 242 (1898).

intimated rather strongly that the court thought the tax constitutional. This he did by way of distinguishing it from those declared invalid in *Fargo* v. *Michigan*[40] and *Philadelphia & Southern Mail S. S. Co.* v. *Pennsylvania*.[41] His comment is as follows:

"In those cases there was a distinct tax upon the gross earnings without reference to any other tax, and not in substitution or in lieu of another tax, while in this case the act plainly substitutes a different method of taxation upon the property of the railroad company. It is a tax upon the lands and all the other property of the company, but instead of placing a valuation upon the lands and other property, and apportioning a certain amount upon such valuation directly, as was the old method, a new one is established of taking a percentage upon the gross earnings as a fair substitute for the former taxes upon all the lands and property of the company, and when it is said, as it is in this act, that the tax collected by this method shall be in lieu of all other taxes whatever, it would seem that it might be claimed with great plausibility that a tax levied under such circumstances and by such methods was not in reality a tax upon the gross earnings, but was a tax upon the lands and other property of the company, and that the method adopted of arriving at the sum which the company should pay as taxes upon its property was by taking a percentage of its gross earnings."[42]

A gross-earnings tax, then, is a property tax, if it is imposed in lieu of a property tax. This sounds somewhat like saying that what is exempted is taxed, and what is taxed is not taxed. By a little logodædaly, things are not what they seem to be. Since taxes on property measured by receipts are valid, and taxes on receipts are not valid, taxes on receipts in lieu of taxes on property must be called taxes on property in order to sustain them. North Dakota had given to the pertinent section of the law of 1883 the heading: "*Percentages of gross earnings to be paid in lieu of other taxes.*"[43] The Act of 1889, in referring to taxes "due under the assessments under said law of 1883," had called them "taxes on both territorial and interstate earnings."[44] But the Supreme Court did not see its way clear to accept the designation and to declare that taxes on receipts from interstate commerce are not regulations of that com-

[40] Note 19, *supra*.

[41] Note 19, *supra*.

[42] 168 U. S. 651, 671, 18 Sup. Ct. Rep. 242 (1898).

[43] *Ibid.*, 654.

[44] Note 39, *supra*.

merce, provided there is no exemption of intra-state receipts and provided further that the tax is in substitution for and not in addition to other taxes. This would have been a more direct and realistic solution of the issue. It is of course but another way of stating the solution actually reached. Whichever way the doctrine is stated, there still remains the question whether a gross-receipts tax, where there is no property to exempt, would be constitutional provided it can be called something else than a tax on receipts from interstate commerce "as such." *Ficklen* v. *Shelby County Taxing District* [45] may be thought to answer the question in the affirmative, provided the gross-earnings tax may be called a tax on a local "occupation." But the tax sustained in that case, though not in lieu of a property tax, was in default of one. We shall consider later whether this makes a difference.

Though the Dakota cases did not definitely pass on the constitutional question, its final settlement was not long delayed. Wisconsin imposed a gross-receipts tax in lieu of other taxes on railroads and its demand was sustained in *Wisconsin & M. Ry. Co.* v. *Powers*,[46] decided in 1903. The opinion of the court by Mr. Justice Holmes was devoted almost entirely to denying the contention that the tax violated contract rights of the complainant. The commerce question was given this terse answer:

"We need say but a word in answer to the suggestion that the tax is an unconstitutional interference with interstate commerce. In form the tax is a tax on 'the property and business of such railroad corporation operated within the State,' computed upon certain percentages of gross income. The *prima facie* measure of the plaintiff's gross income is substantially that which was approved in *Maine* v. *Grand Trunk Railway Co.*, 142 U. S. 217, 228. See also *Western Union Telegraph Co.* v. *Taggart*, 163 U. S. 1." [47]

The Taggart case was one sustaining a tax measured by the value of total capital stock. The Maine case proceeded on a theory of absolute power over privileges enjoyed by foreign corporations. Neither case is so direct an authority in support of the Wisconsin tax as is the decision in the Ficklen case and the strong *dictum* in *McHenry* v. *Alford*.[48]

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[45] Note 23, *supra*.

[46] 191 U. S. 379, 24 Sup. Ct. Rep. 107 (1903).

[47] *Ibid.*, 387–88.

[48] Note 42, *supra*.

Reference has already been made [49] to the difference of opinion among the judges as to the Texas gross-receipts tax on railroads that came before the court in *Galveston, H. & S. A. Ry. Co.* v. *Texas* [50] in 1907. The tax was imposed on all railroads whose lines lay wholly within the state, and the amount demanded by the law was a sum "equal to one per cent of their gross receipts." This included receipts from interstate commerce, since roads whose termini were both within the state nevertheless carried passengers and goods destined for extra-state points over connecting lines. Mr. Justice Harlan for the minority took a position which is in substance in flat contradiction to the one he elaborated in his solitary dissent in the Ficklen case. In seeking to distinguish the Pennsylvania gross-receipts tax declared unconstitutional in *Philadelphia & Southern Mail S. S. Co.* v. *Pennsylvania* [51] from the Texas gross-receipts tax before the court, he says:

"Here there is no levying upon receipts as such from interstate commerce. The State only measures the occupation tax by looking at the entire amount of the business done within its limits without reference to the source from which the business comes. It does not tax any part of the business because of its being interstate. It has reference equally to all kinds of business done by the corporation in the State. Suppose the State as, under its Constitution it might do, should impose an income tax upon railroad corporations of its own creation, doing business within the State, equal to a given per cent of all income received by the corporation from its business, would the corporation be entitled to have excluded from computation such of its income as was derived from interstate commerce? Such would be its right under the principles announced in the present case. In the case supposed the income tax would, under the principles or rules now announced, be regarded as a direct burden upon interstate commerce. I cannot assent to this view." [52]

The learned dissentient cites no authority for his contention. He argues that the operation of the tax "on interstate commerce is only incidental, not direct," [53] and points out that the state constitution authorizes the imposition of occupation taxes on corporations and natural persons, and that "the plaintiff in error is a Texas

[49] 31 HARV. L. REV. 583.

[50] 210 U. S. 217, 28 Sup. Ct. Rep. 638 (1908).

[51] Note 19, *supra*.

[52] 210 U. S. 217, 229, 28 Sup. Ct. Rep. 638 (1908).

[53] *Ibid.*, 229.

corporation." [54] Then follows the indisputable assertion that "it cannot be doubted that the State may impose an occupation tax on one of its own corporations, provided such tax does not interfere with the exercise of some power belonging to the United States." The absence of such interference is predicated on the analysis that the receipts were not taxed as such, but were merely the measure of the tax.

With Mr. Justice Harlan agreed Chief Justice Fuller and Justices White and McKenna.[55] The majority, who held the tax unconstitutional, consisted of Mr. Justice Holmes, who wrote the opinion, and Justices Brewer, Peckham, Day and Moody. At first glance this seems a strange alignment, for Mr. Justice Brewer had been foremost in sustaining property taxes measured more or less by income in part from interstate commerce; and Justices Harlan and White had most strenuously opposed such a measure. Occupation taxes measured by gross receipts seem to bear much more directly on interstate commerce than does a property tax which merely takes account of the value contributed by net earnings. The mystery may be thought to deepen when we compare the division in the Galveston case with that in the Western Union case [56] decided two years later. Here Justices Harlan and White return to their stand against allowing a state to do indirectly what it is forbidden to do directly. Justices Brewer, Day and Moody join them, although in the Galveston case they were in the opposite camp. Justices Holmes and Peckham favor an excise tax measured by total capital stock, but oppose an occupation tax measured by gross receipts. Only Chief Justice Fuller and Mr. Justice McKenna seem to be consistent throughout. They supported the state taxes in all the cases in which they sat.

A closer analysis may resolve some of the perplexity. The opposition of Justices Harlan and White to Ohio's application of the unit rule to express companies and to the Kansas tax on total capital stock is based largely on the conviction that in each case the state was reaching after values not attributable to business or property within its borders.[57] This opposition is not inconsistent

[54] 210 U. S. 228, 28 Sup. Ct. Rep. 638 (1908).

[55] *Ibid.*, 228–29.

[56] Note 21, *supra*.

[57] See 32 HARV. L. REV. 254. Chief Justice Fuller and Justices Brewer and Day dissented in Fargo *v.* Hart, 193 U. S. 490, 24 Sup. Ct. Rep. 498 (1904), which upset an

with approval of the Texas tax on gross receipts from business within the state, where the evil of extraterritoriality is absent. Justices Holmes and Peckham based their approval of the Kansas tax on the theory of the absolute and unlimited power of a state over the local business of a foreign corporation,[58] which precludes inquiry into the effect on interstate commerce of an exercise of that absolute power. They are at liberty to question the Texas tax, since it does not purport to be an excise tax on a privilege completely within the power of the state.

The remaining apparent shifts of opinion demand further explanation. It may be frankly recognized that the only conceivable consistency between Mr. Justice Harlan's disapproval of the Maine excise tax and the Shelby County occupation tax, both of which were measured by gross receipts, and his approval of the Texas occupation tax, similarly measured, is the consistency of dissent. Since Mr. Justice Brewer opposed him in all three cases, these two jurists may appear to be exemplars of the famous political leader who was said to have caught his opponents in bathing and run off with their clothes. We hasten to add that the parallel is at most an intellectual, and not a moral, one; for such change of habiliments as was effected by the wearers of the ermine was not a theft but a swap which appears to have given mutual satisfaction. Mr. Justice Brewer's approval of the Maine excise on gross receipts and his disapproval of the Texas occupation tax on such receipts may be reconciled on the ground that the former had the ostensible justification of a tax on a privilege within complete state control. But this justification the learned justice withheld from the Kansas excise on total capital stock, so that he invites us to seek further for his line of thought. This quest leads us to the arguments of counsel against the Texas occupation tax and to the acceptance of those arguments in the majority opinion in the Galveston case.

Counsel for the railroad apparently make no effort to distinguish the Ficklen case from that before the court. This case is naturally relied on by the state, but it is not mentioned in the available abstract of the brief for the road. To the Maine case, however,

application of the unit rule on the ground that the total capital stock taken as a base included the value of a large amount of personal property in other states not used in the express business and therefore not contributing to any values located in the state. See 31 HARV. L. REV. 772.

[58] See *Ibid.*, 585–88.

Messrs. Garwood and Everts devote considerable attention. They insist that the excise there sustained was like that considered in *Postal Telegraph Cable Co.* v. *Adams*[59] and *McHenry* v. *Alford;*[60]

"that is to say, it was what this court calls a commutation tax levied in lieu of all other taxes; and therefore, in its essential nature, a property tax, or a means resorted to by the state for ascertaining the entire value of the property situated in the state and not otherwise taxed."[61]

As distinguished from such a tax,

"in the case at bar the state has already assessed and equalized for purposes of taxation the properties of the plaintiff in error, and at the time of the levy of this tax, and for long years prior thereto, they had paid taxes, and were paying taxes, to the state upon the full value thus ascertained."[62]

Counsel later seek to restrict the Maine case on grounds which apply also to the Ficklen case, though that inconvenient decision is not mentioned. They argue as follows:

"It never was the intention of the justices who concurred in the decision in *Maine* v. *Grand Trunk R. Co.* . . . to hold that a state could levy an occupation tax on a corporation engaged in the transportation of interstate commerce, or could levy a so-called occupation tax on such corporation, and ascertain the amount thereof by a percentage on the gross receipts of the interstate and foreign commerce; but in fact the tax was there sustained as a property or commutation tax in lieu of all other taxation."[63]

It is clear that the Maine case did not sanction an occupation tax where the element of an exercise of arbitrary power over the enjoyment of corporate privileges was lacking or not relied on. But the Ficklen case appeared to do exactly this. In the Ficklen case, the opinion was flavored slightly with the thought that the tax was sort of a substitute for a property tax; but in the Maine case the

[59] Note 2, *supra*. In February, 1904, Professor Joseph H. Beale, in criticising the ground on which the main case was placed by the court, suggested that a "more tenable ground . . . will probably be found in the later case of Postal Telegraph Cable Co. *v.* Adams." See his article on "The Taxation of Foreign Corporations," 17 *Harv. L. Rev.* 248, 263.

[60] Note 38, *supra*.

[61] 52 L. Ed. 1032.

[62] *Ibid.*

[63] *Ibid.*, 1033. These excerpts from the briefs are not contained in the abstract printed in the official edition of the reports.

point was not mentioned by either the majority or the minority. When we turn, however, to the Maine statute, as printed in the margin of the report of the decision,[64] we find that counsel have correctly analyzed the nature of the tax imposed. From this it appears that all buildings of the road and all land and fixtures outside of its located right of way were taxed locally, and that this tax and the excise measured by gross receipts were "in lieu of all taxes upon such railroad, its property and stock." [65] The gross-receipts tax was the only one levied on account of the rolling stock, the land, ties and rails on the right of way, the capital or intangible property of the company and the economic interests of the shareholders. From the amount thus received by the state, each town in which stock of the road was held was to receive an amount equal to one per cent on the par value of such stock.

This view of the Maine case presented by counsel is accepted by the majority of the court. Mr. Justice Holmes concedes that the case "seems at first sight like a reaction from the Philadelphia and Southern Mail Steamship Company case."[66] He adds not over-confidently: "But it may not have been." [67] Then he proceeds to reinterpret it:

"The estimated gross receipts per mile may be said to have been made a measure of the value of the property per mile. That the effort of the State was to reach that value, and not to fasten on the receipts from transportation as such was shown by the fact that the scheme of the statute was to establish a system. The buildings of the railroad and its lands and fixtures outside of its right of way were to be taxed locally, as other property was taxed, and this excise with the local taxes were to be in lieu of all taxes. The language shows that the local tax was not expected to include the additional value gained by the property being part of a going concern. That idea came in later. The excise was an attempt to reach that additional value. The two taxes together may fairly be called a commutation tax." [68]

Then follow references to *Postal Telegraph Cable Co.* v. *Adams* [69] which sustained a privilege tax, assessed at $1 per mile with a

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[64] 142 U. S. 217, 218, 12 Sup. Ct. Rep. 121 (1891).

[65] *Ibid.*

[66] 210 U. S. 217, 226, 28 Sup. Ct. Rep. 638 (1908).

[67] *Ibid.*

[68] *Ibid.*

[69] 155 U. S. 688, 15 Sup. Ct. Rep. 268 (1895). See 32 HARV. L. REV. 249.

maximum of $3,000, in lieu of other taxes, as in substance a property tax; to the passage in *McHenry* v. *Alford*[70] which is quoted on page 382, *supra;* and to a portion of the majority opinion in the Ficklen case which said that in the Maine case

"it was held that the reference by the statute to the transportation receipts and to a certain percentage of the same, in determining the amount of the excise tax, was simply to ascertain the value of the business done by the corporation, and thus to obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied."[71]

Attention should be called to the fact that Mr. Justice Holmes did not refer to the page in the opinion in the Ficklen case which suggested that the occupation tax might be regarded as a substitute for a property tax.[72] As has already been pointed out, the tax imposed on Mr. Ficklen was rather in default of a property tax than in lieu of one, since he had no property devoted to his occupation and so escaped nothing else by paying the tax on gross receipts. The only distinction in this respect between the Ficklen case and the Galveston case is that the railroad did have property in Texas used in its occupation and that this property was taxed.[73] On this ground the two cases may be distinguished, so that it cannot be said that the latter overrules the former; nor does the opinion in the latter attempt to reinterpret the former. The present health of the Ficklen case will be diagnosed later.[74] If it is not yet moribund, the scope for gross-receipts taxes is somewhat wider than that plotted in Mr. Justice Holmes' reinterpretation of the Maine case. We shall inquire later whether, in order to impose a gross-receipts tax, there must be some other recognized subject of state taxation which is exempted from other burdens than the payment

[70] Note 38, *supra*.

[71] 145 U. S. 1, 23, 12 Sup. Ct. Rep. 810 (1892), referred to, but not quoted, in 210 U. S. 217, 226, 28 Sup. Ct. Rep. 638 (1908).

[72] 145 U. S. 1, 24, 12 Sup. Ct. Rep. 810 (1892). This passage is quoted on page 379, *supra*.

[73] Another distinction which is possibly material in other connections is that the Shelby County tax was only on those who desired to do a "general business," while the Texas tax was on all railroads whose lines lay wholly within the state. The Texas tax would fall by its terms on such a corporation which confined itself to interstate commerce. As a practical matter, however, this distinction is negligible, since no railroad whose lines lay wholly within the state would confine itself to interstate commerce.

[74] See pages 409-16, *infra*.

of a percentage of gross-receipts, or whether it is sufficient that the gross-receipts tax is not a drain on any economic interest that is making other contributions to the state treasury, *i.e.*, whether a gross receipts tax in default of other taxes is as good as one in lieu of them.[75]

Another question that presents itself is whether a gross-receipts tax must be in lieu of all taxation on tangible property or some part thereof, or whether it is saved from sin if the valuation of the tangible property does not include its value as part of a "going concern," that is, does not include the contribution of the business in which the property is employed. The Galveston case does not answer this question. In the Maine case the road-bed and rolling stock contributed nothing to the state except the excise on gross receipts. In the Galveston case, no property of the road went unassessed because of the gross-receipts tax. But it was not because no property went unassessed that Mr. Justice Holmes distinguished the Texas tax from that of Maine. It was because "another tax on the property of the railroad is upon a valuation of that property, *taken as a going concern.*" [76] The value of the business had already been reached by the subjection of the company's franchise to an *ad valorem* tax as property. This value of the business is what the Supreme Court calls the "intangible property." Texas took toll from this intangible property by a tax on the valuation of the franchise and by the gross-receipts tax as well. Plainly a

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[75] See pages 414-16, *infra.*

[76] 210 U. S. 217, 228, 28 Sup. Ct. Rep. 638 (1908). Italics are writer's. In the opinion, this passage is not preceded by "because," but by the statement: "On the contrary, we rather infer from the judgment of the state court and from the argument on behalf of the state that," etc. In the opinion of the state court, Judge Brown, in distinguishing some earlier Texas decisions, said: "The fact that the franchise is subjected in this state to an *ad valorem* tax as property does not militate against the right to tax the persons or the corporations using that property as an occupation any more than would the taxing of the physical property of the railroads, as the tracks, right of ways, cars, etc., operate to prevent the imposition of occupation taxes for the use of them as instruments of transportation. There is nothing in the case cited which intimates a prohibition against levying an occupation tax upon the company which may use the franchises taxed as property. As well might it be held that an *ad valorem* tax upon a storehouse, fixtures, and goods would preclude an occupation tax upon the merchant for pursuing the business of selling goods." State *v.* Galveston, H. & S. A. Ry. Co., 100 Texas, 153, 172, 97 S. W. 71 (1906). The Texas court sustained the tax on the authority of the Maine case and of the Home Insurance case on which the Maine case had been based. The later legislation and judicial decision in Texas are referred to in 31 HARV. L. REV. 762, note 156.

different question would have been presented had the gross-receipts tax been the only effort to draw sustenance from the "intangible property," even though all tangible property was subjected to *ad valorem* assessments.

Henderson Bridge Co. v. *Kentucky*,[77] decided in 1897, appears to be a case in which a tax on the "intangible property" of an interstate bridge company was assessed by capitalizing the gross receipts and then deducting the value of the tangible property. The majority did not notice the fact that gross, rather than net, receipts were used. Chief Justice Fuller contented himself with saying that the authorities cited in the Ohio Express cases sanctioned the method of taxation prescribed by the Kentucky statute, and that the tax was not on the interstate business carried on over the bridge, because the company did not carry on that business but merely received tolls from its lessee, thus bringing the case within *Erie Railroad* v. *Pennsylvania*.[78]

The Erie case seemed to go on the ground that tolls received for rental were not receipts from interstate commerce although the lessee paying the tolls was engaged in interstate commerce, thus treating rent from a leased railroad like rent from a leased office building. The statute, as paraphrased in the opinion of Mr. Justice Shiras, imposed "a tax of eight-tenths of one per centum upon the gross receipts of said company for *tolls and transportation*."[79] No reference is made in the statement of facts or in the opinion to any other features of the state taxing system. Mr. Justice Shiras recognizes that receipts from interstate commerce cannot be taxed directly, but says that "the tax complained of is not laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on."[80] The only hint that the tax was one in lieu of a property tax is contained in the succeeding sentence which says: "It is a tax upon the corporation on account of its property in a railroad, and which tax is measured by a reference to the tolls received."[81]

In the Galveston case Mr. Justice Holmes refers to this passage

[77] Note 7, *supra*.
[78] Note 6, *supra*.
[79] 158 U. S. 431, 435, 15 Sup. Ct. Rep. 896 (1895).
[80] *Ibid.*, 438.
[81] *Ibid.*, 439.

without quoting it, seeming to imply thereby that the tax in the Erie case was in lieu of others. No reference is made to the Henderson Bridge case. This case and the Erie case can both be rested on the doctrine that receipts from rent are not receipts from interstate commerce.[82] In the Henderson Bridge case the receipts were not the direct measure of the tax on intangible property; they were merely used by the assessors as a guide in fixing the value of that property. Plainly, therefore, neither of these cases can be securely relied on to support the contention that a gross-receipts tax is a good substitute for an assessment of the intangible property of the taxpayer, even though no tangible property has been relieved from the ordinary *ad valorem* tax. But such a contention is not foreclosed by either of these cases or by the Galveston case. The possible distinction between taxes on gross and on net receipts will be considered later in connection with the cases dealing with the net income taxes of Wisconsin and of the federal government.[83]

Those who before 1908, when the Galveston case was decided, had struggled in vain to reconcile the decisions on the subject under consideration may still remember vividly the relief afforded by Mr. Justice Holmes' opinion in that case. It would perhaps be too much to say that he straightens out the tangle; but at any rate he tells us what methods will hinder and what will help in accomplishing the task. He makes it clear that no mechanical logic can minister to our needs. He frees us from the tyranny of terms. He exposes the assumption that there is any magic in words. He tells us that "regulation" is a word of art, which the court uses, not for all that regulates, but only for that which regulates too much or in some disapproved way.

"It being once admitted, as of course it must be, that not every law that affects commerce, among the States is a regulation of it in a constitutional sense, nice distinctions are to be expected. Regulation and commerce among the States both are practical rather than technical conceptions, and, naturally, their limits must be fixed by practical lines." [84]

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[82] This doctrine appears to be now abandoned, at least with respect to rental for the use of cars which journey in interstate commerce. See the sentence from Mr. Justice Van Devanter quoted on page 402, *infra*.

[83] See pages 415-16, *infra*.

[84] 210 U. S. 217, 225, 28 Sup. Ct. Rep. 638 (1908).

The absence of a sharp antithesis between the taxes that have been approved and those that have been condemned is frankly recognized:

"As the property of companies engaged in such commerce may be taxed . . . , and may be taxed at its value as it is in its organic relations, and not merely as a congeries of unrelated items, taxes on such property have been sustained that took account of the augmentation of value from the commerce in which it was engaged. . . . Since the commercial value of property consists in the expectation of income from it, and since taxes ultimately, at least in the long run, come out of income, obviously taxes called taxes on property and those called taxes on income or receipts tend to run into each other somewhat as fair value and anticipated profits run into each other in the law of damages. The difficulty of distinguishing them became greater when it was decided, not without much debate and difference of opinion, that interstate carriers' property might be taxed as a going concern." [85]

Then follows the reinterpretation of the Maine case and a quotation from *Postal Telegraph Cable Co.* v. *Adams*: [86]

"By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution." [87]

The question before the court is said to be "whether this is such a tax." [88] Mr. Justice Holmes paves the way for an answer by the following recapitulation and analysis:

"It appears sufficiently, perhaps from what has been said, that we are to look for a practical rather than a logical or philosophical distinction. The State must be allowed to tax the property and to tax it at its actual value as a going concern. On the other hand the State cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a

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[85] 210 U. S. 225–26, 28 Sup. Ct. Rep. 638 (1908).

[86] Note 69, *supra*.

[87] 155 U. S. 688, 697, 15 Sup. Ct. Rep. 268 (1895); quoted in 210 U. S. 217, 227, 28 Sup. Ct. Rep. 638 (1908). This same passage from the opinion in the Postal Telegraph case, together with what immediately precedes it, is quoted by Mr. Justice Day in United States Express Co. *v.* Minnesota, 223 U. S. 335, 347–48, 32 Sup. Ct. Rep. 211 (1912). See page 402, *infra*.

[88] 210 U. S. 217, 227, 28 Sup. Ct. Rep. 638 (1908).

legislature is trying simply to value property, it is less likely to attempt to or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can. Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the States so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form." [89]

These canons were not difficult to apply to the Texas tax before the court. The value of the property as a going concern had already been reached by other taxes. To the argument of counsel for the state that "'equal' implies, not identity, but duality," [90] Mr. Justice Holmes replied:

"The distinction between a tax 'equal to' one per cent of gross receipts and a tax of one per cent of the same, seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. We find no such attempt or anything to qualify the plain inference from the statute taken by itself." [91]

The tax in question was said to be "merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to.'" [92] It was added that "of course, it does not matter that the plaintiffs in error are domestic corporations or that the tax embraces indiscriminately gross receipts from commerce within as well as outside of the State." [93]

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[89] 210 U. S. 227, 28 Sup. Ct. Rep. 638 (1908).

[90] *Ibid.*, 223.

[91] *Ibid.*, 227.

[92] *Ibid.*, 228.

[93] *Ibid.*, 228. Mr. Justice Harlan, on behalf of the minority, implied that it did matter that the corporation was a domestic one, for he says: "The plaintiff in error is a Texas corporation, and it cannot be doubted that the State may impose an occupation tax on one of its own corporations, provided such tax does not interfere with the exercise of some power belonging to the United States" (*Ibid.*, 229–30). The proviso of course weakens the statement in logic, if not in judicial psychology; but later on page 229 in the passage quoted on page 385, *supra*, the dissenting opinion invokes the supposition that the state might impose on railroad corporations "of its own creation" an income tax, thus again implying that the domesticity of the corporation was a material element in the case.

It will be remembered that one of the grounds on which State Tax on Railway

The tax, then, was on the interstate business and not on the property at its value as a going concern. When we seek for the reason why this tax was not on the property as a going concern, we find that it is because there was another tax on the property as a going concern. The reason is not completely satisfying. Disregarding words and looking to substance, we do not readily perceive why one tax as well as the other cannot be on the property as a going concern, nor why one as well as the other is not on the business. There is ample reason why the legitimacy of one may depend on the presence or absence of the other, and there is no just ground for complaint because the court picked for slaughter the one that was before it. Since the state should not have both, but either would be allowable if alone, the designation of the good and the bad is wisely determined in accordance with the formal line of demarcation which the court had previously established. Mr. Justice Holmes correctly states the traditional theory that the state can tax the property at its value as a going concern, but cannot tax

Gross Receipts, 15 Wall. (U. S.) 284 (1872), proceeded was that the corporation was a domestic one, and that this ground of the decision was not overruled in the Philadelphia Steamship case, note 19, *supra*. In 1875, Railroad Co. *v.* Maryland, 21 Wall. (U. S.) 456 (1874), considered in 31 HARV. L. REV. 578–79, sustained a charter provision requiring an interstate railroad corporation to pay to the chartering state semi-annually one-fifth of its total gross passenger receipts. Ashley *v.* Ryan, 153 U. S. 436, 14 Sup. Ct. Rep. 865 (1894), 31 HARV. L. REV. 580–81, and Kansas City, M. & B. R. R. Co. *v.* Stiles, 242 U. S. 111, 37 Sup. Ct. Rep. 58 (1916), 31 HARV. L. REV. 599–600, sustained charter provisions requiring a charter fee or an annual excise measured by total capital stock. The idea in these cases seemed to be that a state can put any price it pleases on the grant of a charter to be a corporation. International & G. N. Ry. Co. *v.* Anderson County, 246 U. S. 424, 38 Sup. Ct. Rep. 370 (1918), however, implies that provisions of a police character in corporate charters may by reason of changed conditions become invalid regulations of interstate commerce.

These cases, however, do not bear on the question involved in the Galveston case, because the tax there in issue was not a franchise tax, nor was it, so far as appears, on the statute book when the complainant was incorporated. The franchise was taxed as property under another statute. Though Texas had avoided naming the "subject" it had selected for taxation, it had by selecting certain kinds of corporations engaged in a certain kind of occupation, imposed an occupation tax. The state court had called it an occupation tax, and had strongly implied, if not specifically declared, in a passage in the opinion immediately preceding that quoted in note 76, *supra*, that this construction was necessary in order to sustain the tax under the state constitution. The exaction, therefore, had to stand or fall as an occupation tax, quite independently of any peculiar power of a state over its own corporate creatures. The Philadelphia Steamship case, note 19, *supra*, at pages 342–43, shows that where a state seeks to justify its exaction as one on the franchise of domestic corporations, it must clearly indicate that this is the power and the only power that it is exercising.

the interstate business. The gross-receipts tax before the court did not profess to be a property tax, whereas by another statute the franchise was subjected to an *ad valorem* tax as property.[94] The state itself had chosen to call one a property tax and the other something else. It can hardly complain that the court accepts its designations in choosing which one to reject, and decides that it is less likely to effect injurious regulation of interstate commerce by the tax which it calls a property tax than by the one which is more directly on interstate receipts.

This traditional theory, as Mr. Justice Holmes announces, posits two necessities that do not admit of logical reconciliation. This is because a tax on the value of the property as a going concern is a tax on the value of the going concern, and the value of the going concern is the value of the business. It would make for simplicity and directness to recognize that a tax on the value of the business is a tax on the business. The business may be worth more or less than the reconstruction cost of the property less depreciation. Where the property has no alternative uses, its value, whatever its cost, cannot exceed the value of the business which it serves. In the case of that part of the property of a railroad which is permanently and inseparably devoted to the business, it would be difficult if not impossible to find its value except through the value of the business. But this does not apply to migratory cars or to the wagons, horses and pouches owned by the express companies in Ohio. With respect to such property it is readily apparent that a tax on the value of the property as a going concern is a tax on the business. This conclusion is fortified rather than disguised by resort to the notion that what the state is taxing is "intangible property." Intangible property has a familiar connotation which is quite distinct from the enjoyment or anticipation of business profits.

The logical nebule which the opinions have exhaled by insisting that taxes on business were taxes on something else was by no means inevitable. It must be dispelled before we can see clearly. It is a legal doctrine that a state cannot tax interstate business, but it is not on economic fact. We might have been saved from wearisome confusion if the court had long ago declared that under some circumstances and by some methods a state may tax interstate business,

[94] See note 76, *supra*.

and that under other circumstances and by other methods it may not. Such a declaration would have turned attention more directly to the circumstances and to the methods. . The rules of law might then have been worked out on matter-of-fact lines which avoided logical inconsistency by avoiding fictions and the semblance of generality when the generality was shadow and not substance.

We have already considered the reasons why it is as wise and necessary to allow the states to tax interstate commerce as to allow them to tax property employed in interstate commerce.[95] Exemption of such commerce from burdens which local commerce must bear would be equivalent to a bounty on interstate commerce. The withholding of such a bounty from interstate commerce ought not in wisdom to be regarded as "a regulation of it in a constitutional sense." But the court must be zealous to restrain the states from obtaining revenue from extraterritorial sources or from imposing cumulative exactions on interstate business without similarly burdening all local business. Owing to the ubiquity of property taxation and to the fact that the value of real estate and of stocks and bonds and similar obligations bears a close relation to the income from such property, a state "is less likely to attempt to or effect injurious regulation," when it "is trying simply to value property" than "when it is aiming directly at the receipts from interstate commerce." [96] On the other hand, the states have been more sporadic and selective in their impositions on occupations and on income. They must therefore be held to strict account when they tax income from interstate commerce. They must establish that the burden is a general and not a discriminatory one.

The court is satisfied when the state shows that the income is taken as a fair measure of the value of property assessed for taxation, or when a tax on income is in substitution for a tax on property. It was satisfied in the Ficklen case when gross receipts were taxed in the absence of taxation on property because there was no property to tax. It has been satisfied more recently with a state-wide income tax measured by net rather than gross receipts.[97] In the presence of

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[95] 32 HARV. L. REV. 260-62.

[96] From Mr. Justice Holmes' opinion in the Galveston case, quoted on page 394, *supra*.

[97] United States Glue Co. *v.* Oak Creek, 247 U. S. 321, 38 Sup. Ct. Rep. 499 (1918). See pages 415-16, *infra*.

these safeguards against discrimination, taxes substantially on interstate business have been sustained. Thus the state may aim directly at gross or net receipts from interstate commerce, if it restrains itself from other shots at the same economic interest, or at net receipts if it aims equally at all receipts from all sources within the state. The law may be stated in this way with little or no fiction, word-juggling or logical inconsistency. Such a mode of statement has the further advantage that it throws the spotlight on the "practical lines" by which the limits of the practical conception of regulation are fixed, and which divide all factual regulations of interstate commerce into those that are, and those that are not, regulations of that commerce "in a constitutional sense."

The distinction set forth in the Galveston case and retroactively applied to the earlier cases acquits Mr. Justice Brewer of the charge of inconsistency. The gross-receipts tax of which he disapproved was in addition to another tax on the same business value; those which he favored were not. This distinction is the basis of the difference between the decisions in *Meyer* v. *Wells, Fargo & Co.*[98] and *United States Express Co.* v. *Minnesota*,[99] both of which were rendered on February 19, 1912. Both involved gross-receipts taxes on nonresident express companies. The Texas tax held invalid in the Meyer case was declared by the statute to be "in addition to the taxes levied and collected upon an *ad valorem* basis upon the property and assets of such corporation." [100] The Minnesota tax held rightfully exacted from the United States Express Company was "in lieu of all taxes upon its property." [101] Both decisions were unanimous.

The greater part of the receipts taxed by Minnesota were held not to be from interstate commerce. These were from carriage between points within the state over a route which passed through a portion of another state. The state court had subtracted that portion of these receipts which the carriage in the intervening state bore to the total carriage. Whether such deduction was necessary the Supreme Court was not called upon to say. It sustained the balance on the authority of *Lehigh Valley R. R. Co.* v. *Pennsyl-*

[98] 223 U. S. 298, 32 Sup. Ct. Rep. 218 (1912).
[99] 223 U. S. 335, 32 Sup. Ct. Rep. 211 (1912).
[100] 223 U. S. 298, 299, 32 Sup. Ct. Rep. 218 (1912).
[101] 223 U. S. 335, 339, 32 Sup. Ct. Rep. 211 (1912).

vania,[102] on which the state court had relied.[103] In the Lehigh case, Pennsylvania had confined itself to the receipts from that part of the transportation which took place within its borders, so that the decision does not affirm that it could not have used the receipts from the entire journey.[104] Chief Justice Fuller stated that the

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102 145 U. S. 192, 12 Sup. Ct. Rep. 806 (1892).

103 State *v.* United States Express Co., 114 Minn. 346, 349–50, 131 N. W. 489 (1911). Of the Lehigh case, Judge Bunn observed: "It perhaps does not appear as clearly as it might whether the recovery in that case was allowed for the entire earnings, or for a proportion thereof based upon the mileage within the state; but we interpret the decision as allowing a recovery of taxes upon that proportion of the earnings derived from the carriage wholly within the state. This seems to us the safer rule, and avoids any question of taxing interstate commerce, and we adopt and apply it to this case. Nine per cent of the taxes recovered on this class of earnings should be deducted from the amount of the recovery" (page 350).

Judge Bunn is warranted in finding the Lehigh case somewhat deficient in clarity. From the statement of facts it appears that the auditor-general of the state had "settled an account" with the company for its taxes on gross receipts, which account included, in addition to receipts from carriage entirely within the state and from carriage between two termini within the state passing en route through another state, five other classes of receipts all of which were from interstate commerce, with the possible exception of class three which was made up of receipts from "transportation by continuous carriage from points in a foreign state to other points in the same state passing through the state of Pennsylvania." The other receipts taken were from interstate commerce originating or ending in Pennsylvania, or passing through Pennsylvania between termini in two other states, or commerce not traversing Pennsylvania at all.

In all instances the total receipts for the entire carriage were taken, and this amount was then reduced to a fraction which corresponded to the fraction of the company's total mileage which lay within the state. The state court relieved the company from any inclusion in the assessment of the last five classes enumerated. So far as appears, the state made no endeavor to amend the account so as to levy on all the receipts in the first two classes. Plainly there was no necessity that it should restrict itself to less than all of the receipts from commerce wholly within the state. Its use of the fraction was part of another plan which the state court frustrated. It is evident, however, it was only the fraction of the receipts from commerce between points in the state passing through the intervening state that came to the Supreme Court, for Chief Justice Fuller states that "the tax under consideration here was determined in respect of receipts for the proportion of the transportation within the State . . ." (145 U. S. 192, 201).

104 The natural inference from the opinion of Chief Justice Fuller is that the whole trip was an intra-state trip, so far as taxation is concerned, since he answers in the negative the question whether "the mere passage over another State renders that business foreign, which is domestic." Ewing *v.* Leavenworth, 226 U. S. 464, 33 Sup. Ct. Rep. 157 (1913), allowed a state to impose a flat fee on this kind of commerce. In New York *ex rel.* Cornell Steamboat Co. *v.* Sohmer, 235 U. S. 549, 35 Sup. Ct. Rep. 162 (1915), it was held that no deduction from receipts for transportation on the Hudson River between New York points was necessary because the route traversed water within the jurisdiction of New Jersey or because the tows which carried the com-

question "is simply whether, in the carriage of freight and passengers between two points in one State, the mere passage over the soil of another State renders that business foreign, which is domestic," [105] and he answered that, "we do not think such a view can reasonably be entertained." [106]

The remaining receipts levied on by Minnesota, to which the United States Express Company objected, were from that part of interstate commerce which it carried on within Minnesota, including carriage to or from points within the state and carriage through the state between termini in other states. All this business was received by the complainant at a point within the state, either from the shipper or from connecting carriers in other states, and was delivered within the state either to the consignee or to a connecting carrier. For some reason Minnesota did not claim taxes upon such interstate receipts "where the same express company performs the transportation service both within and without the State."[107] That this self-denial was imposed by benevolence and

merce were made up in New Jersey. Whether there was any distinction in this respect between transportation over water and that over land was not considered.

In the case of land transportation, the state of termini has been forbidden to regulate the rates of carriage which traverses an intervening state. Hanley *v.* Kansas, etc. Ry., 187 U. S. 617, 23 Sup. Ct. Rep. 214 (1903). The state is also forbidden to direct that a carrier shall ship between two points in the state by a route which is wholly within the state rather than by one which dips into another state. Northern Pacific Ry. Co. *v.* Solum, 247 U. S. 477, 38 Sup. Ct. Rep. 550 (1918). On the other hand, California was allowed to regulate rates for carriage between two points in the state traversing the high seas en route. Wilmington Transportation Co. *v.* Railroad Commission, 236 U. S. 151, 35 Sup. Ct. Rep. 276 (1915). See editorial notes in 27 HARV. L. REV. 686, and 28 HARV. L. REV. 634. Here of course there was no intervening state whose jurisdiction was in any way interfered with.

The Cornell Steamboat case, *supra*, if applicable to land transportation, would allow a state to extract revenue from receipts from transit which is not within its own police protection and which is likely to cause expense to its neighbor within whose borders it takes place. In the Lehigh Valley case, Chief Justice Fuller thought it important to say that "it should be remembered that the question does not arise as to the power of any other State than the State of the termini" (page 202). This carries the possible implication that the transit in the intervening state is interstate commerce, so far as its powers of taxation are concerned. Quite aside from the commerce clause, a grave question arises whether a state should tax receipts from extra-territorial transit. The difference between land and water transportation seems sufficient to warrant the restriction of the Cornell Steamboat case to the particular kind of transportation there before the court.

[105] 145 U. S. 192, 202, 12 Sup. Ct. Rep. 806 (1892).

[106] *Ibid.*, 202.

[107] 223 U. S. 335, 341, 32 Sup. Ct. Rep. 211 (1912).

not by the Constitution is evident from *Cudahy Packing Co.* v. *Minnesota*,[108] decided last April, in which the Supreme Court sustained a similar gross-receipts tax imposed by the same state on receipts earned within its borders from refrigerator cars which ran in and out of the state.

The packing company which owned the cars received a "compensation or rental" [109] of one cent a mile from the railroads which transported them, and paid the railroads the usual tariff rates for the transportation of its own products, allowing the roads to carry the products of others on the return trip. Mr. Justice Van Devanter concluded his opinion by saying that, "we think the tax is not distinguishable from that sustained in *United States Express Co.* v. *Minnesota*," [110] without referring to the fact that in that case "the transportation in connection with such shipments outside of the state of Minnesota was performed by connecting companies other than the defendant." [111] Nor did the opinion refer to the possibility of applying the point made in *Erie Railroad* v. *Pennsylvania* [112] and *Henderson Bridge Co.* v. *Kentucky* [113] that the receipts were from rental of property rather than from interstate carriage. It stated, however, that if the tax "is laid on the earnings as such, they being derived largely from interstate commerce, it is an unconstitutional restraint or burden on such commerce and void," [114] thus abandoning the doctrine of the earlier cases without noticing that it had done so.

Both of these Minnesota taxes were treated as property taxes measured by gross receipts. It appears, however, that from all "receipts for business done within the State by such company in connection with other companies" the United States Express Company was allowed to deduct "the amounts paid for transportation to railroads within the State." [115] No mention of this concession was made in Mr. Justice Day's opinion. From the Cudahy Packing case it appears that the railroads were allowed to deduct their

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[108] 246 U. S. 450, 38 Sup. Ct. Rep. 373 (1918).
[109] *Ibid.*, 451.
[110] *Ibid.*, 456.
[111] 223 U. S. 335, 341, 32 Sup. Ct. Rep. 211 (1912).
[112] Note 6, *supra*.
[113] Note 7, *supra*.
[114] 246 U. S. 450, 453, 38 Sup. Ct. Rep. 373 (1918).
[115] 223 U. S. 335, 339, 32 Sup. Ct. Rep. 211 (1912).

payments for the use of the cars from their "gross earnings" used as the measure of another tax not before the court. This was referred to as disclosing "a purpose to avoid taxing the same property twice or at more than its value, measured by what it earns." [116] The Cudahy people contended that the cars were taxed twice because the railroad paid on their earnings to them less the one cent a mile paid as rental, but Mr. Justice Van Devanter answered:

"The contention apparently assumes that the receipts from such shipments arise solely from the use of these cars, whereas they arise in part from the use of the tracks, locomotives, fuel, labor and the like provided by the railroads. Not improbably only a minor part is fairly attributable to the use of cars. In any event, the company has an interest in the car line which yields it a rental of one cent for each mile of travel. This interest is taxable and the State values it for that purpose by the rental received." [117]

It is obvious that a gross-receipts tax on selected kinds of property may be used as a device to tax property employed in interstate commerce more heavily than the great bulk of property which is assessed by the *ad valorem* method. Unless some curb is set to the rate of assessment on the gross receipts, a state may easily extract from interstate commerce more than its proportional contribution to the public revenues. The court has appreciated this danger. In the United States Express case Mr. Justice Day quotes from the opinion in *Postal Telegraph Cable Co.* v. *Adams* [118] as follows:

"Doubtless, no State could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license tax on the privilege of using, constructing, or operating an instrumentality of interstate or international commerce, or for the carrying on of such commerce; but the value of property results from the use to which it is put, and varies with the profitableness of that use, and by whatever name the exaction may be called, *if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto*, it is not open to attack as inconsistent with the Constitution." [119]

[116] 246 U. S. 450, 456, 38 Sup. Ct. Rep. 373 (1918).

[117] *Ibid.*, 456.

[118] Note 69, *supra*.

[119] 155 U. S. 688, 697–98, 15 Sup. Ct. Rep. 268 (1895); quoted in 223 U. S. 335, 347–48, 32 Sup. Ct. Rep. 211 (1912). Italics are writer's. Another portion of Chief Justice Fuller's opinion in the Postal Telegraph case (not referred to by Mr. Justice

Mr Justice Day then adds:

"We think the tax here in question comes within this principle. There is no suggestion in the present record, as was shown in *Fargo* v. *Hart*, 193 U. S. 490, that the amount of the tax is unduly great, having reference to the real value of the property of the company within the State and the assessment made." [120]

The evil that appeared in *Fargo* v. *Hart* [121] was necessarily absent in the United States Express case, for it consisted of including in the total value of property assessed by the unit rule a large amount of property outside the state not used in the express business and therefore not properly distributable on a mileage basis among the various states in which the express business was carried on. The unit rule was not used in taxing the United States Express Company, since its transportation in question was confined to the limits of the state. The only objection open to the company was that the rate of six per cent on the gross receipts made the tax relatively high as compared with general property taxation. This objection does not appear to have been made.

The point was, however, urged by the Cudahy Packing Company. It appeared that the average number of cars in the state per day ranged from ten to twelve and that "the cash value of each car, as a separate article of tangible property, is from $700 to $900." [122] The contention of the complainant and its dismissal is stated by Mr. Justice Van Devanter as follows:

"Because the usual tax rate if applied to the cash value of the cars taken separately, would result in an appreciably lower tax, it is insisted that the tax imposed is in excess of what would be legitimate as an ordinary tax on the property. But the contention proceeds on an

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Day in the United States Express case) bears on the same point: "But property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a State, and may take the form of a tax for the privilege of exercising its franchises within the State, *if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon)*, and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes." 155 U. S. 688, 696. Italics are writer's.

[120] 223 U. S. 335, 348, 32 Sup. Ct. Rep. 211 (1912).

[121] Note 57, *supra*.

[122] 246 U. S. 450, 452, 38 Sup. Ct. Rep. 373 (1918).

erroneous assumption. The State is not confined to taxing the cars or to taxing them as separate articles. It may tax the entire property, tangible and intangible, constituting the car line as used within its limits and may tax the same at its real value as part of a going concern. The record makes it reasonably certain that the property, valued with reference to its use and what it earns, is worth considerably more than the cash value of the cars taken separately — enough more to indicate that the tax is not in excess of what would be legitimate as an ordinary tax on the property taken at its real or full value." [123]

An interesting variant of the same question is raised in the Ohio Tax cases.[124] Before the decision in the Galveston case, Ohio had a statute under which railroads were required to pay one per cent of their gross earnings from all commerce within the state. After the Galveston decision, the Ohio law was amended so that the gross-receipts tax was limited to intra-state receipts. The rate on railroads however, was increased from one to four per cent. Counsel for the company contended that this increase

"was due to the fact that it was conceived that about three-fourths of their business was interstate, and that therefore a tax of 4% on the intrastate earnings would be about equal to a tax of 1% on the total; in other words, that the tax rate was increased fourfold because such utilities were engaged in interstate commerce." [125]

The argument was that a disproportionate rate on the intra-state receipts of companies whose business was preponderantly interstate was in effect an effort to tax the interstate receipts.

The Ohio tax was not in lieu of a property tax, so that, in view of the general trend of recent decisions, there was strong reason to believe that the court would hold it unconstitutional if, under the guise of levying on receipts from local commerce, it in substance reached those from interstate commerce. The complaint of the companies was like that made unsuccessfully in *Pullman Co.* v. *Adams* [126] and *Allen* v. *Pullman's Palace Car Co.*[127] in which it was urged that a specific tax of $3,000 and a tax of $100 plus twenty-five cents per mile, imposed nominally on intra-state commerce, were in

[123] 246 U. S. 455–56, 38 Sup. Ct. Rep. 373 (1918).
[124] 232 U. S. 576, 34 Sup. Ct. Rep. 372 (1914).
[125] *Ibid.*, 592.
[126] 189 U. S. 420, 23 Sup. Ct. Rep. 494 (1903). See 31 HARV. L. REV. 582.
[127] 191 U. S. 171, 24 Sup. Ct. Rep. 39 (1903). See 31 HARV. L. REV. 582–83.

effect on interstate commerce because the local commerce was unremunerative. The contention was rejected on the ground that the companies were free to abandon the intra-state commerce and thus avoid the tax. This ground of decision was later discountenanced in *Western Union Telegraph Co.* v. *Kansas*,[128] and *Looney* v. *Crane Co.*[129] at least in its application to taxes in substance on extraterritorial values. It does not appear that it was open to the companies before the court in the *Ohio State cases*.[130] Presumably they were not, like the Pullman companies in Mississippi and Tennessee, expressly relieved from the common-law duty to serve all, and therefore could not abandon the local commerce unless they withdrew from the business entirely.[131]

It would seem that counsel for the railroads in Ohio raised a point of undoubted merit, provided it was supported by the facts. The rates on other public utilities less likely to be engaged in interstate commerce were less than half of those on railroads and pipe lines. Plainly there was evidence of a process of artificial selection which, if carried far enough, might effectively impose discriminatory burdens on interstate commerce. The court's treatment of the issue thus raised seems somewhat evasive. Mr. Justice Pitney contents himself with saying:

"The present act does not on its face manifest a purpose to interfere with interstate commerce, and we are unable to accept the historical

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[128] Note 21, *supra*. [129] 245 U. S. 178, 38 Sup. Ct. Rep. 85 (1917).

[130] Note 124, *supra*.

[131] For a different view on this point see Northern Pacific Railway Co. *v.* Gifford, 25 Idaho, 196, 136 Pac. 1131 (1913), 31 HARV. L. REV. 737. See also 31 HARV. L. REV. 762, note 156. Even though a carrier might be permitted by a state to abandon a local business that excessive taxation made unprofitable, such economically enforced abandonment ought on the doctrine of the Western Union case and the Looney case (notes 21 and 129, *supra*) to be held an unconstitutional burden on interstate commerce. Those were cases in which a state had measured its tax by extraterritorial values, but the same unpleasant effect on interstate commerce may be produced by picking for exceptionally high taxation on local business those corporations that are engaged also in the kind of interstate commerce that can be economically conducted only by being carried on in connection with local commerce. For an able discussion of this point see Gerard Carl Henderson, "The Position of Foreign Corporations in American Constitutional Law," 2 HARVARD STUDIES IN JURISPRUDENCE, Cambridge, Harvard University Press, 1918, chapter 7, especially pages 130–31. Mr. Henderson's contribution is of exceptional merit and importance. Its consideration of the struggle between the "restrictive" and the "liberal" theories of the nature of corporations at home and abroad, and of their shifting fortunes, throws a most helpful light on the cases in this series of articles which deal with state excises on domestic or foreign corporations.

facts alluded to as sufficient evidence of a sinister purpose, such as would justify this court in striking down the law. We could not do this without in effect denouncing the legislature of the State as guilty of a conscious attempt to evade the obligations of the Federal Constitution. Assuming the law was changed in 1910 because of a fear that the Cole Law would be held unconstitutional, the mere fact that, while excluding interstate earnings from the multiplicand, the multiplier was increased, is not of itself deemed sufficient evidence of an unlawful effort to burden a privilege that is not a proper subject of state taxation." [132]

This method of dismissal does not close the door to similar objections founded on economics and mathematics rather than on history. The record of state legislatures in the field of indirect action against interstate commerce is hardly one to blind the court to the possibility that now and then some state Solons may be "guilty of a conscious attempt to evade the obligations of the federal Constitution." Without venturing into the precarious enterprise of attempting to analyze motives, we may see signs in the cases reviewed in this discussion that state legislatures have not infrequently sought to attain in roundabout ways what there was good reason to believe might not be accomplished directly.[133]

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[132] 232 U. S. 576, 593, 34 Sup. Ct. Rep. 372 (1914).

[133] Objections based by complainants on the state constitution have a bearing on the commerce question. One road contended that the tax was confiscatory because the gross earnings from intra-state business were not sufficient to pay the actual operating expenses due to that business. Another road adduced in support of the same objection the allegations that it was not "able to earn, from interstate or intrastate business, or both combined, after paying necessary and proper expenses, including taxes other than the excise tax, a return on the investment in its railroad, or on the value thereof, equal to the current rate of return on legitimate high-grade investments at all times readily available in the market" (232 U. S. 576, 588). Reliance was placed on declarations of the Ohio court in earlier cases to the effect that certain provisions in the state constitution "are implied limitations upon the power of taxation of privileges and franchises, and limit such taxation to the reasonable value of the privilege or franchise conferred originally, or to its continued value from year to year," and that "these limitations prevent confiscation and oppression under the guise of taxation, and the power of taxation cannot extend beyond what is for the common or public welfare, and the equal protection and benefit of the people; but the ascertaining and fixing of such values rests largely in the general assembly, but finally in the courts" (*Ibid.*, 588–89).

To this the Supreme Court answered that the state court in the cases relied on "dealt with a general law and its operation on all corporations of given classes throughout the State, and not with its effect upon specific financially weak corporations; that it was not intended to hold that the courts as final arbiters might overthrow a law imposing a tax on privileges and franchises merely because in isolated cases such law

Only two more cases on gross-receipts taxes remain to be considered. Both were decided during the 1917 term of court. The Wisconsin demand in issue in *Northwestern Life Insurance Co.* v. *Wisconsin* [134] was in lieu of all others except taxes on real estate, and was sustained as a commutation tax. Income from real estate was not included in the assessment. The court did not find

"it necessary to decide whether the so-called foreign investment business of the company does or does not of itself amount to interstate commerce," [135]

since it held that,

"if it amounts to commerce of that character no burden is cast upon it by such tax as is here involved, since the gross receipts coming from that character of business are used only as a measure of the value of the property and franchise lawfully taxable in the State." [136]

The Supreme Court accepted the state court's "views of the nature and effect of the law," recognizing that they were not conclusive upon it, but finding "no reason to reject them." [137] Touching the effect of the tax, the state court had found that it did not appear from the allegations in the complaint "that the plaintiff now pays substantially greater sums than it would pay under either the income taxation system or the former personal property taxation system." [138] The rate of levy was three per cent. Nothing in the decision or the opinion closes the door to future contentions that the effect of a gross-receipts tax on selected property or businesses or corporations is to impose disproportionate burdens on interstate commerce and so to amount to a regulation of that commerce "in a constitutional sense." There is every reason to be-

might impose a hardship, but only that those excise laws whose general operation is confiscatory and oppressive are unconstitutional" (*Ibid.*, 589). Mr. Justice Pitney added that it is not "to be inferred that the franchises of plaintiffs in error are valueless merely because it appears that the present earnings of the railroads are not sufficient to pay more than can be derived from legitimate high-grade investment securities that are readily available on the market, or (in the case of one of the roads) are not even sufficient to pay operating expenses. Upon this point we are content to refer to, without repeating, the language employed by Mr. Justice Miller, speaking for this court in State Railroad Tax Cases, 92 U. S. 575, 606."

134 247 U. S. 132, 38 Sup. Ct. Rep. 373 (1918).

135 *Ibid.*, 138.

136 *Ibid.*, 138.

137 *Ibid.*, 137.

138 *Ibid.*, 137.

lieve that the Supreme Court will insist that a gross-receipts tax, imposed as a substitute for property taxes, must be a fair substitute, and must not through excessive rates of levy take disproportionate toll from a selected class of taxpayers engaged in interstate commerce.

The gross-receipts tax declared invalid in *Crew Levick Co.* v. *Pennsylvania* [139] was imposed under the following provision of the statutes:

"Each wholesale vender of or wholesale dealer in goods, wares and merchandise shall pay an annual mercantile license tax of three dollars, and all persons so engaged shall pay one-half mill additional on each dollar of the whole volume, gross, of business transacted annually." [140]

The state court had called the tax one "upon the business of vending merchandise." [141] The complainant during the year in question had received about $47,000 from intra-state sales, so that there was no doubt that it was subject to an occupation tax. It confined its objections to the levy on receipts of about $430,000 from customers in foreign countries, insisting that a tax on such receipts was both a regulation of foreign commerce and an impost upon exports. Of these objections Mr. Justice Pitney said that

"although dual in form, the question may be treated as a single one, since it is obvious that, for the purposes of this case, an impost upon exports and a regulation of foreign commerce may be regarded as interchangeable terms." [142]

The decision may therefore be treated as one on the law of interstate commerce.

The Crew Levick case insistently demands comparison with *Ficklen* v. *Shelby County Taxing District* [143] on which the Commonwealth of Pennsylvania unsuccessfully relied. Formal distinctions between the statutes in the two cases readily suggest themselves. Mr. Ficklen would not have been subject to the Shelby County law if he had not asked for a license to do a general business, but had held himself out to do only interstate business. The Crew Levick Company would have been taxed under the Pennsylvania statute

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139 245 U. S. 292, 38 Sup. Ct. Rep. 126 (1917).

140 *Ibid.*, 293.

141 *Ibid.*, 295.

142 *Ibid.*, 295.

143 Note 23, *supra.*

though it had notoriously restricted its solicitations and ministrations to customers beyond the seas. By no limitation of its enterprise less than a complete abandonment could it exclude itself from the terms of the Pennsylvania law. Nor did it have the possibility enjoyed by Mr. Ficklen of having the exaction measured by the amount of capital employed in the business rather than by the gross receipts therefrom. From every dollar received from interstate or foreign commerce Pennsylvania inexorably demanded that it render tribute unto Caesar. Formally and technically, therefore, the Supreme Court was quite correct in saying that the authority of the Ficklen case "would have to be stretched in order to sustain such a tax as is here in question."[144] Hence formally and technically the Crew Levick case does not overrule the Ficklen case.

In substance, however, the situations of Mr. Ficklen and of the Crew Levick Company were approximately the same. If the Pennsylvania law had been identical with that of Shelby County, the Crew Levick Company would undoubtedly have asked for the same kind of license that Mr. Ficklen did. It would hardly have cut itself off from $47,000 of local business in order to avoid a tax of $215 on its receipts from foreign business. Nor would it be likely to suffer less by having the tax measured by the capital used in the business. Ten cents on each $100 of its capital would amount to more than $215 as soon as that capital exceeded $215,000. It would not appear to be material that the capital of the Crew Levick Company may be otherwise taxed by Pennsylvania, for there is no indication that Mr. Ficklen would have escaped the ordinary property tax on his capital if he had been fortunate enough to possess any.

Looking through form to substance, both Shelby County and the Commonwealth of Pennsylvania imposed an occupation tax measured by gross receipts from all business whether foreign or local. Had the Crew Levick Company, like Mr. Ficklen, done no local business whatever during the year in question, it would still have been within the terms of the Pennsylvania statute, but clearly would not have been engaged in a taxable occupation, and so would not have been caught, as he was caught, by reason of the peculiar provision of the Shelby County Law whereby taxability depended upon professions and not upon events. But here by the course of

[144] 245 U. S. 292, 296, 38 Sup. Ct. Rep. 126 (1917).

events the Crew Levick Company was engaged in a taxable occupation. It was taxable and was taxed. The only dispute was over the measure of the tax. The Supreme Court disallowed that part of the measure which embraced receipts from commerce not confined to the state. It did not hold the Pennsylvania law void. If later the Pennsylvania court interprets the law as not applicable to concerns that refrain from local business,[145] the Supreme Court will have difficulty in applying the Crew Levick case without definitely overruling the Ficklen case.

In the absence of such a restrictive interpretation by the state court, the Supreme Court followed established practice[146] in refusing to rewrite the state law so as to bring it within the doctrine of the Ficklen case. Taking the Pennsylvania law as it reads, it plainly taxes interstate as well as local occupations; and, in so far as it makes the former a subject of taxation, it easily comes within the condemnation visited on those imposts which are "on interstate commerce itself" or on receipts from such commerce "as such."[147] Pennsylvania had not encased its demand in the fiction coating which is essential to bring it within those levies on interstate commerce which have been regarded as "merely incidental or indirect." At times this coating has seemed to need no other ingredient than words. The Crew Levick case naturally excites our curiosity whether a merely verbal compound can in these days turn poison into meat.

Mr. Justice Pitney's opinion indicates that it cannot. Not a little that he says is quite as applicable to the tax sustained in the Ficklen case as to that held invalid in the Crew Levick case. Of the former he says that "undoubtedly that case is near the border

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[145] For an instance of such construction by a state court of a statute imposing license taxes varying in amount according to the population of the towns and cities in which business was carried on, see Osborne *v.* Florida, 164 U. S. 650, 17 Sup. Ct. Rep. 214 (1897). In the cases of taxes on gross receipts the federal courts will make the necessary separation, when it is feasible, and hold void only that part on interstate receipts. Ratterman *v.* Western Union Telegraph Co., 127 U. S. 411, 8 Sup. Ct. Rep. 1127 (1888). But where a specific fee is imposed, the Supreme Court will not assume that the subject taxed is local business only if the language of the statute applies to any or all business. See cases cited in note 146.

[146] Leloup *v.* Port of Mobile, 127 U. S. 640, 8 Sup. Ct. Rep. 1380 (1888); Crutcher *v.* Kentucky, 141 U. S. 47, 11 Sup. Ct. Rep. 851 (1891); Williams *v.* Talladega, 226 U. S. 404, 33 Sup. Ct. Rep. 116 (1912).

[147] See cases cited in note 19, *supra.*

line." [148] One distinction which he draws is so frail that a breath of thought would disintegrate it. "Besides," he says,

"the tax imposed in the *Ficklen Case* was not directly upon the business itself or upon the volume thereof, but upon the amount of commissions earned by the brokers, which, although probably corresponding with the volume of the transactions, was not necessarily proportionate thereto. For these and other reasons the case has been deemed exceptional." [149]

This assumed distinction is no more than that the Crew Levick Company sold their own products, while Mr. Ficklen was a somewhat independent intermediary between seller and purchaser. It is the distinction between receipts from commissions on sales and receipts from sales. One is quite as likely not to be necessarily proportional to the volume of the transactions, if this means the quantity of goods sold, as is the other. Even if by "volume of the transactions" Mr. Justice Pitney means the volume as measured by gross receipts, it cannot be important that the broker's commissions were not exactly proportional to the prices paid the seller. If the broker's part in the transaction is regarded as interstate commerce, his receipts are from interstate commerce, and whether he were paid by the day or the deal or by a percentage can hardly matter. In so far as there is any validity to the distinction suggested, it relates to the nature of the business involved in the different cases and not to the character of the statutes.

It is not unlikely that it is a distinction between the businesses that the learned Justice has in mind. This can hardly be gathered from the opinion in the Crew Levick case, but it finds support in an earlier opinion of the same Justice in *United States Fidelity & Guaranty Co.* v. *Kentucky* [150] which sustained a specific tax upon a mercantile agency engaged in reporting the financial responsibility of merchants who bought goods from without as well as from within the state. In that opinion Mr. Justice Pitney says:

"The present case has no close parallel in former decisions, but in some of its aspects it bears a resemblance to the case of a tax imposed upon a resident citizen engaged in a general business that happens to include a considerable share of interstate business. *Ficklen* v. *Taxing District*, 145 U. S. 1. Or the business of the live stock exchange that was under

[148] 245 U. S. 292, 296, 38 Sup. Ct. Rep. 126 (1917).
[149] *Ibid.*, 297.
[150] 231 U. S. 394, 34 Sup. Ct. Rep. 122 (1913).

consideration in *Hopkins* v. *United States,* 171 U. S. 578, 592. Or the business of a cotton broker dealing in futures or options. *Ware* v. *Mobile County,* 209 U. S. 405." [151]

The Hopkins case and the Ware case held that the acts in question were not acts of interstate commerce. The collocation suggests that the broker who is a mere intermediary is less intimately connected with commerce than a vendor or his regular drummers. It is not likely that the court would go so far as to hold that such a sales broker, like the broker who furnishes exchange,[152] is not himself engaged in the commerce which he facilitates. But the passage above quoted has the aroma of the idea that Mr. Ficklen was a degree or two removed from direct participation in interstate commerce, and that therefore the tax which was sustained against him must be subjected to more rigid tests if ever it is sought to be imposed on those whose receipts are from interstate commerce instead of being receipts from receipts from interstate commerce. To the extent that the Ficklen case is now sought to be explained or apologized for on any such notion, it is excluded from the class of cases with which we are concerned and, from the standpoint from which we are considering it, is abandoned.

We hardly need, however, to enter upon such refinements to discern that, even if the Ficklen case still lives, its working days are over. Of the tax from which the Crew Levick Company was relieved, Mr. Justice Pitney says:

"It operates to lay a direct burden upon every transaction in commerce by withholding, for the use of the State, a part of every dollar received in such transactions. That it applies to internal as well as to foreign commerce cannot save it; . . . That portion of the tax which is measured by the receipts from foreign commerce necessarily varies in proportion to the volume of that commerce, and hence is a direct burden upon it." [153]

This would be quite as applicable to a tax specifically imposed on a local occupation but measured by receipts from all sources. To sustain a tax on interstate receipts, something more is now needed than the declaration of the state that it is merely using the receipts as the measure of a tax on something else that is taxable. The

[151] 231 U. S. 399, 34 Sup. Ct. Rep. 122 (1913).
[152] Nathan *v.* Louisiana, 8 How. (U. S.) 73 (1850).
[153] 245 U. S. 292, 297–98, 38 Sup. Ct. Rep. 122 (1917).

court now demands that behind that declaration there must be something more substantial than words. The verbal distinction on which *Maine* v. *Grand Trunk Railway Co.*[154] originally rested has been replaced by substance. The Ficklen case, which leaned strongly on the Maine case for support, must be similarly reinterpreted before its foundations are solid, unless the court is willing to preserve an anomaly out of respect for *stare decisis*.

The only possible reinterpretation of the Ficklen case which can make it applicable to all kinds of interstate commerce is one which treats it as sanctioning the use of gross receipts to measure the "intangible property" of the taxpayer; and thus to estimate values not reached by any other tax. This possibility finds some recognition in Mr. Justice Pitney's comment on the Pennsylvania tax to the effect that "it bears no semblance of a property tax, or a franchise tax in the proper sense; nor is it an occupation tax except as it is imposed upon the very carrying on of the business of exporting merchandise." [155] The Shelby County tax was not one that could be regarded as "on" a franchise or "on" property, unless a gainful occupation is to be deemed "intangible property." This notion of "intangible property" has not been entertained by the court except where the intangible has inhered in or been conceptually fused with something that was tangible. If pushed further and applied where nothing tangible is present, the so-called "intangible property" becomes so patently nothing but the value of an occupation or business that the court must inevitably recognize it as such.

Such recognition still leaves a loophole for the Ficklen case. It might conceivably squeeze through the opening left by the statement in the Crew Levick case that the tax there in issue is not "an occupation tax except as it is imposed upon the very carrying on of the business of exporting merchandise." [156] This leaves room for the notion that an occupation tax imposed on carrying on local business might be measured by receipts from all business, subject to the restriction that the expedient taxes but once and without discrimination the values contributed by interstate commerce. There is no reason, as we have seen,[157] why such values should go com-

[154] Note 5, *supra*.
[155] 245 U. S. 292, 297, 38 Sup. Ct. Rep. 122 (1917).
[156] Cited in note 155, *supra*.
[157] 32 HARV. L. REV. 260-62, and *Ibid.*, 398.

pletely untaxed. Where they arise from business unconnected with any use of property, they do go untaxed unless some form of income tax is allowed. The question must be whether Shelby County's form of income tax should be approved, or whether the states should be driven to adopt some other method less likely to invade the realm which the states must not enter.

The latest utterance of the Supreme Court indicates that the latter alternative is to be chosen. In sustaining the general income tax of Wisconsin, measured by net income, the opinion in *United States Glue Co.* v. *Oak Creek*[158] laid stress on the difference between gross receipts and net income. After contrasting the Crew Levick case with *Peck & Co.* v. *Lowe*,[159] which held that the federal income tax was not a tax on exports when measured by net income from an exporting business, Mr. Justice Pitney observed:

"The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or so to diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large." [160]

Here is wisdom that cannot be gainsaid. It applies so palpably to any occupation tax measured in whole or part by gross receipts from interstate commerce that the Ficklen case can hardly hope to survive the menace to its last remaining strength. With permission to tax net income from all commerce by a general statewide income tax, the states can no longer complain that the death of the Ficklen case would compel them to confer a bounty on interstate commerce by exempting it from burdens which rest on local commerce. The gross-receipts taxes allowed in substitution

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[158] 247 U. S. 321, 38 Sup. Ct. Rep. 499 (1918).

[159] 247 U. S. 165, 38 Sup. Ct. Rep. 432 (1918).

[160] 247 U. S. 321, 329–30, 38 Sup. Ct. Rep. 432 (1918).

for *ad valorem* taxes on railroad cars and other property may be distinguished on the ground that they represent the degree of use of such property more closely than do other taxes, and that the degree of use bears a fairly close relation to the responsibilities and possible expense which such property causes or is likely to cause the taxing authority.

This subject will be adverted to again in the succeeding section dealing with taxes on net incomes "as such."

(*To be continued.*)

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